

Singh (Migration) [2019] AATA 2158 (4 March 2019)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Amardeep Singh
CASE NUMBER:	1809646
HOME AFFAIRS REFERENCE(S):	BCC2018/698151
MEMBER:	Stephen Conwell
DATE:	4 March 2019
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Student (Temporary) (Class TU) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 500 (Student) visa: • Public Interest Criterion 4020 for the purposes cl.500.217 of Schedule 2 to the Regulations.

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3. *Statement made on 04 March 2019 at 6:23pm*

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CATCHWORDS

MIGRATION – Student (Temporary) (Class TU) visa – Subclass 500 (Student) visa – false and misleading information in visa application – no intention to deceive or commit a fraud – applicant did not have benefit of professional assistance – distinction between unintentional and deliberate submission of incorrect information – decision under review remitted

LEGISLATION

5. *Migration Act 1958 (Cth), ss 5, 65*

6. *Migration Regulations 1994 (Cth), r 1.12; Schedule 2, cl 500.217; Schedule 4, Public Interest Criterion 4020*

7.

CASES

8. *Arora v MIBP [2016] FCAFC 35*

9. *Batra v MIAC [2013] FCA 274*

10. *Trivedi v MIBP [2014] FCAFC 42*

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

11. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 20 March 2018 to refuse to grant the applicant a Student (Temporary) (Class TU) visa under s.65 of the Migration Act 1958 (the Act).
12. The applicant applied for the visa on 11 February 2018. At the time of application, Class TU contained two subclasses: Subclass 500 (Student) and Subclass 590 (Student Guardian). The applicant applied for the visa to undertake study in Australia and does not claim to meet the criteria for a Subclass 590 (Student Guardian) visa.
13. The delegate in this case refused to grant the visa on the basis that the applicant did not satisfy the requirements of cl.500.217 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the Department found that the applicant provided false and misleading information in his current visa application when he answered 'no' to the following question *'Has the applicant, or any person included in this application, ever had an application for entry or further stay in Australia or any other country refused, or had a visa cancelled?' (hereinafter referred to as 'the relevant question')*.
14. The applicant appeared before the Tribunal on 25 February 2019 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Punjabi and English languages.
15. The applicant was represented in relation to the review by his registered migration agent who attended the Tribunal hearing.
16. For the following reasons, the Tribunal has concluded that the decision under review should be remitted for reconsideration.

17. *Background*

18. The applicant is a 20 year old citizen of India. He came to Australia on 25 January 2014 as the holder of a Subclass 573 visa. He is currently enrolled in a Diploma and Advanced Diploma of Leadership and Management.
19. According to the delegate's Decision Record the applicant was previously refused a Temporary Activity Entertainment (GG 408) visa on 7 August 2017.
20. On 11 February 2018, the applicant applied for a Student (subclass 500) visa. The Decision Record, a copy of which was provided with the review application, states that the applicant submitted a completed *'Application for a Student Visa'* form. The delegate noted that under the sub-heading 'Visa history', the applicant was asked *'Has the applicant, or any person included in this application, ever had an application for entry or further stay in Australia or any other country refused, or had a visa cancelled?'* To which the applicant answered "no".
21. The delegate noted that furthermore the applicant had declared in the application form to have read and understood the information in the application form and to have provided complete and correct information in every detail on the form and on any attachments to it.
22. On 9 March 2018, the applicant was invited to comment on the suspected 'non-genuine' information in the visa application that submitted to the Department. On 14 March 2018, the following response was provided to the Department in the form of a statutory declaration:

"I Amardeep Singh residing at 7 Lush court, Altona Meadows VIC, 3028 declare that at the time of lodging my online student visa application I clicked on 'no' instead of 'yes' to one question in regards to previous rejection on Australia visa. This happened

unknowingly by clicking on wrong answer. I apologise for this. I request you to please consider my application as I really wish to study in Australia.”

23. The applicant's representative's tendered a written submission dated 22 February 2019 to the Tribunal urging the Tribunal to make a distinction between the unintentional giving of incorrect information and the deliberate submission of incorrect information.
24. During the hearing the applicant gave oral evidence that was consistent with the information contained in his statutory declaration and written submission provided by his representative.

CONSIDERATION OF CLAIMS AND EVIDENCE

25. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.500.217 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
26. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

27. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
28. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.

29. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
30. The Tribunal has considered the facts in this case individually and cumulatively in assessing whether there is evidence the applicant has given or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth information that is false or misleading at the time it is given and is relevant to any of the criteria that may be considered when making a decision on an application and is in relation to the visa application.
31. The applicant does not dispute the answer he provided to the relevant question, as to whether he has ever had an application for entry or further stay in Australia refused, was not correct. At the hearing the applicant contended his incorrect response on the online application for a subclass 500 Student visa was a genuine mistake as he had completed the application by himself without legal or migration advice.
32. The submission by the applicant's representative claims that as the Department possesses a record of all visa grants and refusals, the applicant has no intention to provide incorrect information; his incorrect answer to the relevant question arose from an innocent mistake and not from any intention to deceive or commit a fraud upon the Department.
33. There is no suggestion in this matter that the applicant provided bogus documents in association with his visa application. The Tribunal has reviewed the available evidence and finds that the applicant did not give, or cause to be given a bogus document in association his Student visa application.
34. The applicant's explanation at the Tribunal hearing, which is entirely consistent with that which he has provided in his written submissions, was that he made an honest mistake, in the context of completing the visa application, without the assistance of a lawyer or registered migration agent. Having considered the evidence the Tribunal is satisfied it supports the applicant's claim as to his not having the benefit of professional assistance when he completed his online visa application.
35. The question of what constitutes false or misleading information involves several considerations. Most importantly, PIC 4020 is directed at information which is false, in the sense of purposely untrue, rather than information which lacks the necessary element of fraud or deception (e.g. in the case of an innocent or unintended mistake). The Tribunal is satisfied the incorrect response to the question of whether the applicant, or any person included in the visa application, ever had an application for entry or further stay in Australia or any other country refused, or had a visa cancelled was not intended to deceive in any way. The Tribunal finds that the applicant therefore did not provide false or misleading information to the Department.
36. Therefore, the applicant meets PIC 4020(1).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

37. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).
38. There is no evidence the applicant or any member of the family unit (as defined in r.1.12) have been refused a visa in the relevant period because of a failure to satisfy PIC 4020(1).
39. Therefore, PIC 4020(2) is met.

Has the applicant satisfied the identity requirements?

40. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. The applicant has provided his passport to the Department. There is no evidence before the Tribunal to suggest that there is any uncertainty regarding the applicant's identity. Therefore, the applicant meets PIC 4020(2A).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

41. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).
42. There is no evidence the applicant or any member of the family unit (as defined in r.1.12) have been refused a visa in the relevant period because of a failure to satisfy PIC 4020(2A).
43. Therefore PIC 4020(2B) is met.
44. On the basis of the above, the applicant does satisfy PIC 4020 for the purposes of cl.500.217.

Stephen Conwell
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen; justify the granting of the visa.
- (5) In this clause:
information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

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Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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